

100-1248

Serial: D6/54/72
21 August 1972

Mr. Bruce B. Wilson
Acting Assistant Attorney General
Antitrust Division
United States Department of Justice
Washington, D. C. 20530

Re: United States v. International Business Machines
Corporation, 69 Civ. 200, S.D. N.Y.

Dear Mr. Wilson:

Your letter of 14 August 1972 advises that the Government is required to identify documents which it withholds from production under Pretrial Order No. 2 of Judge Edelstein on a claim of privilege. You have asked the National Security Agency to identify its documents being withheld by type, date, originator, recipient, subject matter and nature of security interest. We understand that you propose providing the schedule of documents to the Court and to the defendant. As discussed below, we respectfully decline to furnish such information for national security reasons.

The Director of NSA has submitted an affidavit pointing out that the documents and information of the National Security Agency of the kinds described in Pretrial Order No. 2 are uniquely privileged documents of the Executive Branch of the United States which should be used only for national security purposes and should not be disclosed for any other purpose. A list of classified materials which identifies their subject matter and explains why each document is classified would in our judgment be inconsistent with directives to this Agency to protect cryptologic information. The provision of this information to the defendant would certainly serve no national security interest of the United States.

The Congress has enacted comprehensive provisions of law to prevent the disclosure of classified and unclassified activities of NSA. 18 U.S.C. 798 prohibits the unauthorized disclosure -- and even the prejudicial use -- of classified cryptologic information of the Government. As stated in the House Report on this legislation, this statute covers "only a small category of classified matter, a category that is both vital and vulnerable to an almost unique degree." A second law, Public Law 86-36, goes further and provides

that no law shall be construed to require the disclosure of any of the activities of the National Security Agency. A third statute, Public Law 88-290, prescribes a comprehensive personnel security system and procedures to control the access of persons to National Security Agency information. Finally, with specific reference to disclosure of documents concerning procurement of computers, the House Committee on Government Operations said in its Report No. 802 in 1965 that it is of paramount importance that agencies with intelligence or security responsibilities maintain their security in line with appropriate Federal statutes and as the President might direct.


Over the period of many years, this Agency has testified on many occasions on our missions in Executive Sessions before different Committees of the Congress. We recall no instance in which a Committee of the Congress has released our testimony on cryptologic missions.

We again invite Judge Edelstein to visit this Agency. We will fully inform him alone, at NSA, of the nature of our activities and of the national security aspects regarding the documents in issue. We cannot, however, extend similar invitations to defendant's employees or counsel or even to other officials of the United States Government who have not received a prior clearance for our information.

If the matter of producing the documents remains in dispute, we desire to rely on the Congressional and Executive Branch policy of many years standing, and enacted into several laws, that there be no disclosures concerning cryptographic systems and signals intelligence activities of the United States. We consider the withholding of these documents to constitute more than a privilege. The Congress has directed that their release cannot be compelled.

The Secretary of Defense and the Director, NSA, are personally responsible for complying with the aforementioned public laws and the orders of the President governing the physical protection of and the access to classified information of this Agency. Should the Court disagree with this position, we then desire that an appeal be taken on that ruling. Until that time, we must maintain these documents in secrecy.

Sincerely yours,



General Counsel

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